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SUPREME COURT, U.S.

No. 071274

IN THE

Supreme Court of the United States

ARTHUR "SKIP" CROSS

Petitioner

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY and DIVERSIFIED FOODS, INC.

Respondent

REPLY BRIEF

PAUL BRIAN SPURLOCK
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IN THE
SUPREME COURT OF THE UNITED STATES

ARGUMENT

I. The Fifth Circuit should have, but did not, employ a less deferential review.

Reliance states (p.24) that, due to the acknowledged conflict of interests, "the Fifth Circuit gave less deference to Reliance Standard's decision...." But, in fact, the Fifth Circuit held:

> Contrary to Cross's argument, the administrative record **does not show a strong conflict of interest necessitating a less deferential review.** (Emphasis supplied)

Thus, despite the arbitrary rejection of treating physician opinions, **no less deferential review was undertaken**. Apparently, merely on the basis of defendant's dual role as administrator and payor of benefits, this finding is now erroneous under *Metropolitan Life Insurance Co. v. Glenn*, No. 06-923 (U.S. 6/19/2008) (2008 WL2444796) (hereinafter *Glenn*), which held:

> We here decide that this dual role creates a conflict of interest; that a reviewing court **should** consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits; (emphasis supplied)

But the primary questions before the Court are (1) whether Reliance did "arbitrarily refuse to credit a

claimant's evidence, including the opinions of a treating physician" as prohibited by *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), and (2) whether such arbitrary refusal constitutes abuse of discretion and/or denial of "full and fair review" such as to require reversal.

II.A. Reliance arbitrarily refused to credit Mr. Cross's evidence, including the opinions of treating physicians.

Reliance argues that the opinions of the treating physicians and, presumably, plaintiff's other reliable evidence, **was** considered and, hence, was not arbitrarily rejected. Plaintiff urges that some opinions were not even considered and that, for the remainder, no reasons or indefensible reasons were given for their rejection.

In "Reasons for Denying the Petition" I.A. "There is No Split in the Circuits," Reliance states:

> In his Petition, Mr. Cross argues that the opinions of his treating doctors were ignored or rejected without Reliance Standard specifying a reason. Clearly, the opinions of Mr. Cross' doctors were not ignored as they were specifically addressed by Drs. Goldstein and Caren and discussed at length in the decision letters. (AR 2-7, 230-233, 254-258).

In fact, neither Dr. Goldstein nor Dr. Caren make any mention of the opinions of any of the treating

physicians, except that Dr. Caren lists the June 23, 2004 letter of Dr. Kusnick among the documents reviewed. Reliance carefully does not argue that it specified cause for rejecting those opinions. Nor does Reliance quote any portion of the reports of Drs. Goldstein and Caren nor of the decision letters to support its contention that reasons were offered for the rejection of these opinions, except to argue (p.17) that Dr. Porter was wrong to opine "that job stress would make it more difficult to control (Mr. Cross') hypertension." This was addressed by petitioner at p.23. Petitioner urges this reasoning as "indefensible."

Apparently, Reliance interprets the *Nord* prohibition as satisfied if *some* of the opinions are *considered*. Petitioner urges that *Nord* requires a *rationale* for rejecting *all* such opinions, so that reviewing courts can determine whether they were rejected arbitrarily.

Reliance flatly states (p.14), "Dr. Goldstein specifically addressed the opinion of treating physician Dr. Kusnick, who stated that Mr. Cross was disabled in June 2004." Review of Dr. Goldstein's report (Appendix A) shows that nowhere does he even mention Dr. Kusnick's opinions, nor does he even indicate that the June 23, 2004 letter of Dr. Kusnick was received by him. There is no mention of Dr. Sotolongo's April 3, 2002 Attending Physician statement, in which he lists the symptoms and objective findings and states that Mr. Cross was "incapable of clerical or administrative (sedentary) activity" and notes stress "with production" (R.A., p.

462).[1]

> Reliance then states, at p. 15:
>
> Dr. Caren identified all of the treatment records that he considered, provided a summary of them and then explained why he disagreed with the opinions relied upon by Mr. Cross (AR 230-231). (Appendix B)

Reliance is correct that Dr. Caren listed the treatment records provided him, which specifically did include the June 23, 2004 "Physician's Statement" of June 23, 2004 (but not apparently the letter of the same date of Dr. Kusnick), and provided a summary of Mr. Cross's procedures, tests and complaints. But nowhere does he even mention Dr. Kusnick's opinions except to acknowledge the receipt of one, nor does he even indicate that the Attending Physician's statement of Dr. Sotolongoto was received by him. Nowhere does he otherwise mention the opinion of Dr. Jacoby that his limitations "would make meaningful employment difficult" (R.A., p. 36). Nor does he otherwise mention Dr. Porter's statement:

> Based on my review, I conclude, as have all the cardiologists who have treated him, that Mr. Cross is totally and permanently disabled for any occupation...." (R.A. p.9)

---

[1]As Reliance notes, plaintiff concedes that Dr. Goldstein was supplied some, but not all, of Dr.Sotolongo's records.

Defendant urges other reasons for rejecting the opinions of Mr. Cross's physicians. Whatever the dubious significance of these arguments, they are the *post-hoc* arguments of counsel. The burden was on defendant to explain why it rejected these opinions, not for counsel to do so before the Supreme Court. As the circuit court noted in *Glenn v. Metlife*, 461 F.3d 660 (6th Cir. 2006), " the court's role is to review the basis for the decision that was actually made by the plan administrator...."

Finally, neither Reliance in its decisions, nor its consultants, nor Reliance in its Brief in Opposition, mentions the opinion of Dorothy V. McGarry R.N., B.S.N., C.R.R.N. that Mr. Cross is incapable of performing more than sedentary work, which would preclude his past work (R.A. p.261). This though the file was submitted to her by Reliance for her opinion and though she certified that she has "the training and experience in the area of nursing practice encompassed in this review." Reliance cannot now complain that the opinion they sought does not constitute "reliable evidence."

II.B Arbitrarily rejecting Mr. Cross's reliable evidence should constitute reversible error.

At pp. 17-18, Reliance appears to offer its defense. Reliance cites the opinions upon which it based its decision and urges that this constitutes the basis for rejecting a claimant's apparently "reliable evidence." Reliance states (p.17):

The reports of Drs. Goldstein and Caren

> provided Reliance Standard with "reliable evidence" that contradicted the medical opinions relied upon by Mr. Cross. Therefore, there is no basis for the argument on page 19 of the Petition and elsewhere that the opinions of his three (sic) doctors "are unrefuted by any medical source"[2] or were ignored.

In other words, Reliance urges that it need not actually explain why a claimant's evidence is not reliable. It need merely show that there is a basis for its decision, and such factors as length of treatment, expertise, frequency of treatment, relative supportability, relative consistency, failure to consider stress, *etc.* need not be **weighed** in evaluating conflicting opinions. This appears to be inconsistent with the holding in *Nord*, which explains that the "treating physician rule" is not necessarily prudent in ERISA claims because:

> [T]he assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by the plan has expertise the treating physician lacks.

---

[2] Petitioner was specifically referring to job stress, which was not mentioned by Drs. Goldstein and Caren.

This statement appears to imply that length of treatment and expertise, at least, are factors that should be considered. Whether administrators must weigh such factors in choosing between competing medical opinions is the issue the Supreme Court is asked to address.

In *Glenn*, the Supreme Court analogized ERISA cases to those arising under trust and administrative law, noting that such cases "ask judges to determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by **weighing** all together." (emphasis supplied)
Petitioner urges that such weighing applies to all medical opinions and requires an explanation of the result

It is now up to the Court to determine whether, when it said in *Nord* that such administrators "may not" do so, it meant, as the Third, Fourth, Sixth and Ninth Circuits hold, "may not," or whether, as the Fifth Circuit has effectively held, it meant "should not, but it is permissible."

In *Audler v. Astrue*, 501 F.3d 446 (5th. Cir., 2007), the Fifth Circuit held:

> [T]he ALJ offered nothing to support her conclusion at this step and because she did not, "we, as a reviewing court, simply cannot tell whether her decision is based on substantial evidence or not."

The same principle should apply herein.

Reliance urges that even reporting the opinions of a claimant's sources satisfies the prohibition against arbitrary rejection of that opinion (p.17). Plaintiff urges that a reasonable explanation for the rejection is necessary for a reviewing court to tell whether that rejection is based on substantial evidence or not.

III. It was reversible error for Reliance to ignore the "common care and prudence rule."

In. *Glenn*, the Supreme Court said:

> The Court of Appeals ultimately set aside MetLife's denial of benefits in light of a combination of several circumstances:...(5)
> MetLife's failure to take account of evidence indicating that stress aggravated Glenn's condition. (p.6)
>
> ...
>
> All these serious concerns, taken together with some degree of conflicting interests on MetLife's part, led the court to set aside MetLife's discretionary decision. See *id.*, at 674-675. We can find nothing improper in the way in which the court conducted its review. (p. 15)

Hence, though the *Glenn* court did not specifically address the "common care and prudence rule," plaintiff urges that it has tacitly approved the doctrine.

Most of Reliance's arguments address Mr.

Cross's attempts to work against medical advice until the day before he gave up and retired. Reliance has beguiled the Fifth Circuit panel into dismissing the "common care and prudence rule" because Mr. Cross was loath to accept the advice of his cardiologists and stop working.

Temporarily convincing himself that working as sales manager for another employer would not cause job stress, and planning to continue to sacrifice his health for money, he sent out resumes, obviously hoping to move seamlessly from one job to another. Any offers he might have received do not appear in the record. Obviously, after realizing (R.A.-p.24), "This relentless drive to increase sales and cut costs would be typical with any major company," he made his final decision and contacted Dr. Kusnick, who sent a letter the same day confirming plaintiff's disability. No resumes were sent by Mr. Cross on or after June 23, 2004.

It should be noted that no physician advised him to find a different employer. They all found him disabled, period.

Reliance, and the Fifth Circuit, urge that Mr. Cross's medical opinion as to whether he could safely continue to work is paramount. The proposed rationale is that he thought he could work for another employer. Even had he thought so before he retired, he obviously did not think so from the time he retired forward, for, as indicated by his *forma pauperis* application to the Fifth Circuit, he never returned to any work and is supported by Social Security disability benefits. Thus

Mr. Cross went from a six-figure job to a pauper. Reliance and the Fifth Circuit apparently believe that, on retirement, he still felt, and feels, that he could do other work but has been holding back ever since, putting his money on the proposition that Reliance, the Fifth Circuit or the Supreme Court would reverse the decision of the District Court. Mr. Cross urges that he knows the odds. If Mr. Cross's opinion on "common care and prudence" has any value, it would be limited to his opinion when and after he retired, not while he was still working.

Reliance argues (p.7, 16) that the treating physicians did not relate stress as a factor in Mr. Cross's disability, specifically citing Dr. Kusnick's letter of June 23, 2004. In fact, Dr. Kusnick did not, in that letter, make **any** statement whatever as to what aspect of plaintiff's job would have the most deleterious effect on him (R.A., p. 457). But in his previous visit, on June 7, he noted "severe excess work stress" (R.A. p. 458).

Moreover, Dr. Sotolongo said, "My recommendation to him is that he retire as I think his work is bringing on a significant amount of stress in his life." (R.A. p. 292). And Dr. Porter said:

> The assessment of prognosis for Mr. Cross's several medical problems requires that the role of job stress, and its known adverse effects on the symptoms and progression of coronary artery disease, be taken into account. This assessment is necessarily subjective, but no less

> important, than the results of an exercise test...Job-related stress would make his hypertension more difficult to control, which in turn would hasten the progression of his coronary artery disease and increase the risk of more cerebral infarctions and brain damage." (R.A., p. 10)

Of course, whether because of the effects of stress or physical functioning, all of Mr. Cross's physicians and Dorothy V. McGarry, R.N., B.S.N., C.R.R.N. found Mr. Cross to be disabled, and Reliance arbitrarily rejected their opinions.

Reliance also repeatedly states (p.7, 8, 16) that Mr. Cross "has now abandoned" his contention that the physical requirements of his job are a factor in his disability and that he "concedes 'that he could have physically performed the requirements of his job' after he stopped working." (p.16)

First, Mr. Cross stated in his petition, "Petitioner has stipulated that he could have physically performed the requirements of his job on the day after he retired, **but only if the effects of such continued work are not a consideration.**" (Emphasis supplied) In focusing exclusively upon Mr. Cross's physical ability to perform his job no matter the consequences, Reliance apparently continues to argue against the "common care and prudence" rule.

As to Mr. Cross's abandoning of the deleterious effects of the physical requirements of his job, he has

done no such thing (Petition, p. 19 (malevolent influence), p. 24 (petitioner's conditioning), p.33 (items 1, 2, 3). Spatial limitations merely require Mr. Cross to choose his battles. The second basis for Mr. Cross's petition is the utter failure of Reliance to consider the effects of stress, and it is this argument he addresses.

Conclusion

The Fifth Circuit has essentially held that Reliance had a basis for its conclusions without having to bother to evaluate and reject Mr. Cross's evidence. And Reliance has discretion. End of story.

The Ninth Circuit, in *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir., 2006) , reversed the trial court's decision because:

> [T]he district court declined to decide whether or not a waiver of premium application was submitted to Alta's predecessor on behalf of Dr. Abatie. Instead, the court reviewed the evidence both supporting and undermining Plaintiff's claim that a waiver application had been submitted. The court appeared to conclude simply that **the administrator did not abuse its discretion because there was evidence on both sides of the issue**. (Emphasis supplied)

In the Fifth Circuit, arbitrary rejection of a claimant's reliable evidence doesn't even activate a

reduction in discretion. In the Third, Fourth, Sixth and Ninth Circuits, it constitutes reversible error.

Petitioner is aware that the *Glenn* court eschewed articulation of specific rules. For Chief Justice Roberts, this threatens to allow *de novo* review of every case in the Ninth Circuit. But in the Fifth Circuit, it means that claimants can point to no specific errors to justify reversal.

There are some rules that must be basic to any fair determination, and explaining the weight given to the evidence and the rationale therefor must be one of them. And this protection must be available to plaintiffs in the Fifth Circuit as well as those in other Circuits.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL BRIANSPURLOCK
Attorney for Petitioner
DATE: July 1, 2008

APPENDIX A:

RELIANCE STANDARD LIFE INSURANCE COMPANY

ARTHUR CROSS
Claim NO: 2004-189-069
Policy No: LSC 104498-2
Date: 11 September 2004

This 56 year old man's disability claim has been sent to me for my review and response to several questions posed by Mr. Rob Loy (9/8/04). The medical records for this claim come from two sources, i.e., Dr. Carlos Sotolongo (cardiologist, 4/19/94 through 5/16/02) and Dr. Barry Kusnick (cardiologist, 2/19/03 through 8/4/04). I will summarize the essential features of this cardiac claim first, and then provide my answers and the explanations for them.

This gentleman had a congenital bicuspid aortic valve recognized as a youngster" which finally required an aortic valve replacement (Starr-Edwards), "in June 1982." This required chronic anticoagulation therapy, which has been done, and serial echocardiograms (2/14/00 through 3/4/02 studies available) confirm a satisfactory peak and mean gradient, as well as normal left ventricular size and left ventricular ejection fraction. "Mild concentric hypertrophy," first reported on 5/4/94, has also persisted.

On 4/19/94 hypertension was first detected (with initiation of specific therapy on 5/4/94), and, after a negative exercise test ("last summer." 4/3/96), coronary artery disease was established in October 1998. This diagnosis has led to a series of exercise and/or pharmacologic stress test (10/20/98, 10/27/98, 5/8/00, 3/4/02, 2/7/03, 2/4/04, and 3/4/04), and, in connection

with monitoring of his aortic valve replacement, a series of echocardiograms (2/14/00, 3/12/01, and 3/4/02 available records), as well as serial cardiac catheterizations (11/11/98, 5/17/00, 3/11/02, and 2/20/03), all reflecting the recurrent, episodic exacerbations of his coronary artery disease. Concurrent with these studies, the client has had percutaneous coronary interventions (angioplasty and/or stenting) in November 1998 and May 2000, and then coronary artery bypass graft (left internal mammary artery to the left anterior descending coronary artery, radial artery to diagonal) in February 2003. It is of somo-importance that one may summarize the pertinent findings from this extensive serial testing to document: (a) he has consistently performed between 6 to 8 minutes on a Bruce Protocol exercise test, last on 3/4/04, 7 minutes, 30 seconds at 90% of maximum predicted heart rate, achieving 9.4 NETS, with a "borderline" EKG response and "negative without evidence of stress induced myocardial ischemia," and (b) by echocardiography and/or isotope studies, he has maintained a normal left ventricular ejection fraction of 60 plus/minus percent (and no definite evidence of any myocardial infarction).

With this objective data review based summary, I will now address the questions:

1. I believe these records do support the client's ability to perform a light duty occupation. The last exercise test 3/4/04 established his 9.4 MET capacity, and in accordance with standard cardiac

rehabilitation criteria ([1] [2]) this would equate to an occupational limitation of 3.76 METS. This in turn satisfies the demands for a light duty category (see attached photocopies). Although Dr. Kusnick saw the client twice after the 3/4/04 testing (6/7/04 and 7/26/04), he has not requested any such testing again.

2. I see no evidence of any cardiac change in or around 2004. I would note that on 8/1/01 (Dr. Sotolongo) it was reported, "he is walking...at a pace of about a 15 minute mile," and on 7/20/04, Dr. Kusnick described he "walked 1-1/2 miles in 35 minute; the latter would approximate to three miles in one hour and this (see attached photocopy) is "Physical Conditioning" commensurate with "Category Light 3-5 METS" occupational" status.

3. By reference to the serial exercise tests, I see no evidence that the client ban exceeded his demonstrated physical capacity in the past (except for those episodes requiring active therapy intervention for exacerbations of his coronary artery disease), nor would he be required to do so currently.

s/ Marvin Goldstein, M.D.

MG:at
Attachments

---

[1] Twentieth Bethesda Conference: Insurability and Employability of the Patient with Ischemic Heart Disease, Journal American College of Cardiology; 14:4, October, 1989; 1004-1044

[2] Clinical Cardiac Rehabilitation, edited by Paskow and Defoe, Second Edition, 1999.

APPENDIX B:

Jeffrey F. Caren, M.D., F.A.C.C.

Cedars-Sinai Medical Towers
8635 West Third Street, Suite 890W
Los Angeles, California 90048
(310) 659-0714 fax (310) 659-0664

American Board of Internal Medicine — Qualified Medical Evaluator

AIBM, Cardiovascular Diseases — Agreed Medical Evaluator

Patricia Wallace LPN
IME Coordinator
United Review Services
67 Walnut Avenue
Suite 405
Clark, New jersey 07066

Claimant: Arthur Cross
Insurance Co: Reliance Standard Life Insurance
Adjustor: Barbara Finnegan
Ins. File: 2004-189-069
URS File: P67779
Review Type: Cardiac Peer Review

CARDIAC PEER REVIEW

Dear Ms. Wallace,

Thank you for your request that I provide a

cardiac peer review of the above captioned patient's medical file. I have carefully reviewed the following documents:

1. Cardiac Catheterization, Carlos M. Sotolongo, MD, November 11, 1998
2. Cardiac Catheterization, Carlos M. Sotolongo, MD, May 17, 2000
3. Cardiology progress notes, Carlos M. Sotolongo, MD, April 19, 1994 through April 18, 2002
4. Lakeview Regional Medical Center, Hospitalization, February 19 — 26, 2003
5. Adenosine Cardiolite Stress Test, February 4, 2004
6. Cardiolite Stress Test, March 4, 2004
7. Physician's Statement (Reliance Standard Life Insurance Co) Barry N. Kusnick, MD, FACC, June 23, 2004.
8 Medical Progress Notes, Barry N. Kusnick, MD, June 6, 2003 through July 26, 2004
9. Disability Evaluation, Marvin Goldstein, MD, September 11, 2004
10. Denial of Benefits Letter, Reliance Standard Life Insurance Co., September 24, 2004
11. Carotid Artery Duplex Ultrasound Report, December 15, 2004
12. Echocardiogram Report, December 15, 2004
13. Cardiology Progress notes, Richard M. Jacogy, MD, FACC, January 21, 2004 through March 3, 2005
14. Declaration of Arthur Lee Cross, Jr., March 10, 2005
15. Independent Medical Examination William G. Porter, MD, Match 16, 2005

History of Illness:

Arthur Cross is 56-year-old Director of National

Account Sales who has applied for long term disability benefits because of aortic valve disease, coronary artery disease and dyslipidemia causing severe shortness of breath, fatigue, weakness, dyspnea on exertion, chest pain, palpitations and depression.

Mr. Cross had a congenital aortic stenosis corrected with a Star Edwards prosthetic valve replacement in 1984. He has a past history of TIA. In 1998, he developed symptomatic' coronary artery disease. On November 11, 1998 he had a PTCA of the distal Right Coronary Artery. On May 17, 2000, he had a PTCA of a 79% stenosis of the OMB of left circumflex coronary artery. There was a residual 40% stenosis of the distal right coronary artery. In February 2003, catheterization revealed high-grade stenosis of the proximal left anterior descending coronary artery and a diagonal branch not amenable to PTCA. February 24, 2003, he underwent a left internal mammary artery (LIMA) implant to the left anterior descending coronary artery with a radial artery jump graft to the diagonal branch.

In the months following surgery, the patient's weight increased from 226 pounds to 262 pounds, a gain of 36 pounds. He initially complained of fatigue. On February, 4, 2004, an Adenosine Stress Test was normal. On March 4, 2004, a Cardiolite Stress Test was negative for exercise-induced ischemia. The patient achieved a peak exertion of 9.4 METS. He companied of dyspnea and chest discomfort at peak exertion. On June 7, 2004 he complained to Dr. Kusnick of fatigue, dyspnea on exertion, chest pains, light headiness, insomnia, and stress at work. On July 26, 2004, he reported that he had walked 1.5 miles in 35-minutes. An echocardiogram on December 12, 2004 revealed mild left ventricular hypertrophy, intact LV systolic function (LVEF 50%) and a normal systolic gradient for a Star Edwards prosthetic valve. On December 15, 2004 A Carotid Artery Duplex Scan revealed a high

grade left subclavian artery stenosis with flow reversal.

On January 14, 2005, Mr. Cross complained to Dr. Jacoby of angina at 200 yards. His weight was 241 pounds. There was a 14 mm-systolic differential between the right and left arms.

Diagnoses:

1. **Coronary Artery Disease**. Mr. Cross had symptomatic stenosis of the right coronary and left circumflex coronary arteries, relieved with. PTCA in 1998 and 2000, respectively. He had stenosis of the left anterior descending coronary artery and diagonal branch bypassed in 2003. The effectiveness of the LIMA to the LAD and the jump graft to the diagonal branch is suspect because of a subclavian artery stenosis proximal to the origin of the internal mammary artery. Overall flow may be further compromised by the pressure gradient across the prosthetic valve. There is no available data on the sensitivity of Cardiolite Stress Testing with this anatomical combination. In the setting of obstructive coronary artery disease, a negative Cardiolite study would be associated with less thar. 1% probability of a coronary event during the following 24 months.
2. **Obesity**. The BMI is 30.25. Obesity and de-conditioning are contributing factors, to dyspnea on exertion and fatigue.
3. **Left Subclavian Artery Stenosis**
3. **Star Edwards Aortic Valve**: The valve has been in place 25 years. The durability of the valve beyond 20 years is not known. As of December 15, 2004, the valve had an expected gradient. The Star Edwards Valves have a relative high risk for embolic injury. Mr. Cross is at risk for embolic CVA. Prophylaxis for embolic events

requires anticoagulation with its attendant risk of bleeding.

4. **Hypertension**: Blood pressure has been well controlled. Hypertension is a risk factor for exacerbation of atherosclerosis.
5. **Dyslipidemia**: As of January 14, 2005, total Cholesterol was 280, with LDL at 207. The NECP recommended goal for individuals with CAD is <240 and <100, respectively. Ongoing dyslipidemia is a risk factor for exacerbation of atherosclerosis.
6. **Metabolic Syndrome**: The combination of obesity, hypertension and dyslipidemia has been identified as high risk for CAD.
7. **Sleep Apnea**: The records do not completely document this diagnosis. Sleep apnea can exacerbate hypertension. Sleep apnea can cause lethal cardiac arrhythmias. Sleep apnea causes daytime fatigue and may be a contributing cause of the patient's symptoms.

Recommendations:

1 Initiate statin therapy and treat to attain NECP goals.
2. Weight reduction to a target weight <= 180 pounds.
3. Treat blood pressure to a targeted level of < 140/90.
4. Subclavian and coronary angiography, subclavian artery angioplasty/stent.
5. Cardiac Rehabilitation for 6 to 12 weeks, with: a) supervised exercise program; b) dietary counseling; and c) behavior modification/stress management.
6. Warfarin therapy to maintain INR 2.5 to 3.5.
7. Sleep study if clinically indicated.

Conclusion:

In my opinion, treatment to date has been appropriate. I would expect recovery after subclavian PTCA to occur within two weeks. Thereafter, the patient will require lifelong treatment for hypertension, dyslipidemia and embolic prophylaxis. Replacement of the Star Edwards valve is not anticipated, but is also not predictable.

The clinical records indicate a functional status NYHA FC II (ches: discomfort walking, 200 yards). Stress testing on March 4, 2004 revealed an average functional capacity for age, with symptoms at peak exercise. The Cardiolite testing indicates a low risk profile for future cardiac events. Therefore, the patient is capable of working at a light occupation, as defined by the U.S. Dept. of Labor, in the Dictionary of Occupational Titles. Without correction of the subclavian stenosis, the work restriction would be permanent.

If I can be of any further assistance in the Peer Review, please do not hesitate to contact me.

Sincerely,

s/ Jeffrey F. Caren

Jeffrey F. Caren, M.D. F.A.C.C.

Diplomate of the American Board of Internal Medicine
Diplomate of the American Board of Internal Medicine, Cardiovascular Diseases
Assistant Clinical Professor of Medicine
David Geffen School of Medicine at UCLA
JFC:go

APPENDIX C:

RELIANCE STANDARD
Life Insurance Company

Disability Claims Department
P.O. Box 8330
Philadelphia, PA 19101-8330
(267) 256-3500
(800) 351-7500
June 16, 2005

Lesesne & Connette
Attorneys at Law
1001 Elizabeth Ave., Suite 1-D
Charlotte, NC 28204

Re: Long Term Disability
Claim Number: 2004 189 069
Policy Number: LSC104498
Your Client: Arthur Cross

Dear Mr. Connette:

We are writing to you regarding the appeal of our decision to deny your client's claim for Long Term Disability (LTD) benefits. Please be advised that Reliance Standard Life Insurance Company ("RSL") strives to treat all claimants fairly and evaluate claims submitted to us in an objective and equitable manner.

Under RSL guidelines Mr. Cross is entitled to an independent review of the claim facts and the determination made regarding his eligibility for benefits. The file was referred to our Quality Review Unit to conduct such a review. This review has been conducted separately from the individual (s) who made the original decision to deny benefits.

We have conducted an independent review of

your client's claim file and have determined that our original decision to deny LTD benefits was appropriate.

Based on the information contained in Mr. Cross's claim file, at the time that his claim was originally denied, it was determined that your client was not eligible for LTD benefits as the information in the claim file did not support a "Total Disability" as defined by the group Policy.

The group policy defines **"TOTAL DISABILITY,"** in relevant part, with respect to **CLASS 2** employees as follows:

"Totally Disabled" and "Total Disability" mean, with respect to CLASS 2, that as a result of an Injury or Sickness:

(1) during the Elimination Period and for the first 24 months for which a Monthly Benefit is payable, an Insured cannot perform the material duties of his/her regular occupation;

(a) "Partially Disabled" and "Partial Disability" mean that as a result of an Injury or Sickness an Insured is capable of performing the material duties of his/her regular occupation on a part-time basis or some of the material duties on a full-time basis. An Insured who is Partially Disabled will be considered Totally Disabled, except during the Elimination Period;

(b) "Residual Disability" means being Partially Disabled during the Elimination Period. Residual Disability will be considered Total Disability; and...

"ELIMINATION PERIOD" means a period of *consecutive* days of Total Disability, as shown on the Schedule of Benefits page, for which no benefit is payable (emphasis added).

Mr. Cross's Elimination Period would have begun on 6/25/04, as it begins on the first date of Total Disability". This means that the group Policy requires your client to be "Totally Disabled" at the time that they ceased working, and throughout the Elimination Period to be entitled to benefits. The Elimination Period under policy LSC104498-2 is 90 consecutive days of "Total Disability". This means that Mr. Cross would have to be "Totally Disabled" at the time that he ceased working, and through 9/23/04 for benefits to be payable.

The medical documentation provided must support evidence of a physical or mental impairment that would warrant limitations and restrictions precluding your client's ability to perform the *material* duties of his occupation.

To determine if Mr. Cross meets the group Policy definition of "Total Disability" with regards to his claimed physical impairment, and to address your request for an appeal on this basis, we have reviewed your correspondence of 3/11, and 3/21/05, all of the information you have submitted on behalf of your client, including a medical examination by Dr. William G. Porter, M.D., along with the information previously contained in Mr. Cross's claim file.

It should be noted that at our request the information in the claim file was reviewed by Jeffrey F. Caren, M.D., F.A.C.C., Diplomate of the American Board of Internal Medicine, and Diplomate of the American Board of Cardiovascular Diseases. Dr. Caren's report will be discussed, in part, in the body of this letter.

In our review of your client's original claim application we note that he documents that his last day of work was 6/25/04 reporting a disability associated with congenital heart disease. He reported that he first became aware of his symptoms in 1960.

Briefly stated, medical records in the claim file document a long-standing history a congenital heart condition that necessitated an aortic valve replacement in 1982. As noted by Dr. Goldstein (reviewing physician in 9/04), "This required chronic anticoagulation therapy, which has been done, and serial echocardiograms (2/14/00 through 3/4/02 studies available) confirm a satisfactory peak and mean gradient, as well as normal left ventricular size and left ventricular ejection fraction. "Mild concentric hypertrophy" first reported on 5/4/94, has also persisted." Dr. Goldstein noted that hypertension was first detected in 4/94, and coronary artery disease was established in 10/98. Medical records document stenting in 1998, and 2000, and coronary artery bypass graft in 2/03.

As you are aware, at the conclusion of his review Dr. Goldstein opined, "I believe these records do support the client's ability to perform a light duty occupation...I see no evidence of any cardiac change in or around June 2004. I would note that on 8/1/01 (Dr. Sotolongo) it was reported, "he is walking...at a pace of about a 15 minute mile," and on 7/20/04, Dr. Kusnick described he "walked 1 1/2 miles in 35 minutes", the latter would approximate to three miles in one hour and this is "physical Conditioning" commensurate with "Category Light 3-5 METS" "occupational" status."

We have reviewed the information you submitted from Dr. Jacoby, Mr. Cross's cardiologist who started treating your client approximately 6 months after he ceased working. Dr. Jacoby documents that Mr. Cross's reported functional limitations would make "meaningful employment difficult." We note a narrative report from Mr. Cross's prior cardiologist, Dr. Kusnick, dated 6/23/04. At that time, Dr. Kusnick advocates permanent disability for your client indicating that he was at "maximum medical rehabilitative state", in spite of the fact that Mr. Cross

documents that he never participated in the cardiac rehabilitation program following his by-pass surgery (as was suggested by Dr. Kusnick , 8/5/03).

We have reviewed the 3/16/05 report from Dr. Porter who reviewed records at your request. Dr. Porter opines, "...based on the probability that continued employment, even in a relatively sedentary occupation, would pose considerable medical risk to Mr. Cross. Job-related stress would make his hypertension more difficult to control, which in turn would hasten the progression of his coronary artery disease and increase the risk of more cerebral infarctions and brain damage." However, actual medical records do not support this theory in that just six months prior to Mr. Cross's work stoppage (while working) his blood pressure was 140/90 while Dr. Jacoby's records note that Mr. Cross's blood pressure readings have remained fairly consistent. Just one week prior to Dr. Porter's report (and 9 months after your client stopped working), Dr. Jacoby's records (3/7/05) document that your client's blood pressure was 142/96.

We have reviewed Dr. Caren's 4/26/05 report of his review of information in the claim file. Dr. Caren opines that to date treatment has been appropriate. Dr. Caren concludes, "The clinical records indicate a functional status NYHA FC II (chest discomfort walking 200 yards). Stress testing on March 4, 2004 revealed an average functional capacity for age, with symptoms at peak exercise. The Cardiolite testing indicates a low risk profile for future cardiac events. Therefore, the patient is capable of working at a light occupation, as defined by the U.S. Dept. of Labor, in the Dictionary of Occupational Titles. Without correction of the subclavian stenosis, the work restriction would be permanent."

As a basis for evaluating the material duties of an individual's regular occupation, RSL utilizes the Dictionary of Occupational Titles (DOT) published by

the Department of Labor as to the material requirement of occupations. In your request for an appeal on behalf of Mr. Cross we have reviewed your client's claim of "Total Disability" utilizing documentation provided in the DOT for this occupation. The position requirements of Director of National Sales were reviewed by a staff vocational specialist. They have determined that the nature and scope of your client's position is best represented by two DOT occupational titles (DOT 260.357-014/light Sales Representative, DOT 163.167-018/sedentary Manager Sales, Therefore, in considering the physical material duties of both of these occupations, Mr. Cross's regular occupation would be performed at the light exertion capacity.

Please be advised that the Policy under which your client was covered was intended to provide a benefit if he was unable to perform the material duties of his occupation. The Policy is not, necessarily, intended to provide a benefit if he is unable to perform the material duties of his job at Diversified Foods, Inc. The difference between an occupation and a job being that an occupation is a vocation or profession as it typically exists in the general labor market whereas a job is a set of specific tasks performed for a specific employer.

We have reviewed your client's statement dated 3/10/05 wherein he relates his medical and work history, and his physical condition. Mr. Cross notes that his occupation is not "sedentary", and we concur as discussed above. Mr. Cross notes that the added management responsibilities created considerably more stress and pressure on a daily basis. In addition to Mr. Cross's description of his job responsibilities he describes his superior's "relentless" expectations. This corresponds with Dr. Kusnick's office notes of 6/7/04 wherein he documents your client's report of severe stress at work. "Up against a very adversarial supervisor". While your client's employer may be

"relentless" and have unrealistic expectations, these factors pertain to your client's particular job at Diversified Foods, Inc. Mr. Cross's claim for benefits was evaluated based upon his ability to perform the material duties of his *occupation*. Stress is a subjective concept and it exists in all aspects of life. The information we have reviewed does not document that your client was incapable of performing the material duties of his *occupation* but rather indicates that he was experiencing an adversarial relationship with his boss. Again this circumstance relates to a specific job situation that Mr. Cross was experiencing at Diversified Foods. Consequently, based on the information in the claim file we have determined that the nature of your client's complaints would not preclude him from performing his *occupation*.

Mr. Cross documents in his statement (3/10/05) that he was seeking "lighter or less stressful positions in the food sales industry, but I had give up finding related occupations because of the deterioration in my health." However, our review of the information in the claim file does not support Mr. Cross's description of the events that took place during the period immediately prior to his work stoppage. Information in the claim file indicates that for several months prior to his work stoppage Mr. Cross was actively job searching in an effort to relocate back to Florida. An e-mail in 4/04 notes that Mr. Cross was applying for a position in regional sales. On 5/12/04, Mr. Cross was communicating by e-mail concerning a position as Regional Manager/National Sales Manager. On 5/28/04 Mr. Cross points out that "I really want to get back to Florida to finish my career." Finally, in an e-mail on 6/3/05 Mr. Cross notes that he was applying for positions as a District Sales Manager, Franchise Operations, Director Sales and Marketing, and Regional Sale Executive. Mr. Cross applied for many of these positions just days prior to his alleged

disability (6/25/04). These positions would hardly invite the theory that your client was attempting to place himself in positions that would be lighter in scope or less stressful as your client alleges. The obvious missing component in this regard would be Mr. Cross's adversarial relationship with his boss. Again, this is specific to his position at Diversified. Food and is not disabling in and of itself.

Records reveal that Mr. Cross did not consult with his cardiologist between 1/21/04 and 6/7/04, and. again between 6/7/04 and 7/26/04 (even though he stopped working on 6/25/04). Therefore, one would conclude that the letter of advocacy for disability written by Dr. Kusnick on 6/23/04 was prompted by your client's visit to his physician on 6/7/04,and that there was a discussion in this regard between Dr. Kusnick his patient. However, on the evening of 6/7/04 (date of Mr. Cross's doctor's visit) Mr. Cross e-mailed his resume for positions in sales and management. Mr. Cross sent his resume to the same individual on 6/22/04 just a day before Dr. Kusnick's letter advocating disability. Mr. Cross's activities in seeking alternative employment in his own occupational field just two days before he ceased working (and one day before his physician advocates permanent disability) does not support your client's 3/10/05 "Declaration" of the circumstances surround his work stoppage.

The group Policy LSC104498-2 contains the following provision in the **BENEFIT PROVISIONS**:

INSURING CLAUSE: We will pay a Monthly Benefit if an Insured:

(1) **is Totally Disabled as the result of a Sickness or Injury covered by this Policy;**
(2) is under the regular care of a Physician;
(3) has completed the Elimination Period; and
(4) **submits satisfactory proof of Total Disability to us.**

(Emphasis Added)

In conclusion, we agree with the Claims Department's decision that your client was not "Totally Disabled" as defined by the group Policy from a physical or mental condition since the date that he ceased working. Information in the claim file reveals that during the final week of his employment Mr. Cross was seeking to relocate to Florida to finish his career and was actively seeking employment in his own occupational filed (sales) at an executive or management level. While he may not have been successful in this endeavor, and was obviously dissatisfied with his boss's management style/demands, Mr. Cross's work stoppage is indicative of a life choice rather than an *inability* to perform the material duties of his *occupation*. When we consider all of the information in the claim file we must agree with Dr. Goldstein and Dr. Caren's assessments in that Mr. Cross is capable of performing full time employment at the light exertion level. As the material requirements of Mr. Cross's regular *occupation* is performed at the light exertion level as classified by the Department of Labor's DOT, your client does not meet the RSL group Policy definition of "Total Disability". In fact, the medical data available documents Mr. Cross's history of long-term symptoms during a time period in which your client was *able* to continue working.

Therefore, the medical records we have reviewed do not support a conclusion that your client was were physically or mentally *incapable* of performing the material duties of his regular light level occupation. As Mr. Cross demonstrated the *ability* to perform the material duties of his regular occupation (and was continuing to seek employment in his own occupational field with a different employer) one would expect the medical records to document a significant deterioration of your client's physical or mental status at or around 6/25/04, if that condition suddenly rendered your client *unable* to work. Consequently, Mr. Cross does not meet

the applicable definition of "Total Disability" and is not eligible for LTD benefits in connection with this claim.

We regret that our decision could not have been more favorable to your client however, we are limited by the information in the claim file and the provisions of the group Policy. Please be advised that our *claim decision is now final; as Mr. Cross has exhausted any administrative remedies available to him under the terms of the Policy.*

Nothing in this letter should be construed as a waiver of any of RSL's rights and defenses under the above captioned policy, and all of these rights and defenses are reserved to the Company, whether or not specifically mentioned herein.

We will, upon specific request and free of charge, provide copies of all documents, records, and/or other information relevant to your client's claim for benefits. We will also, upon specific request and free of charge, provide copies of any internal rule, guideline, protocol or other similar criterion (if any) relied upon in making this determination.

In the event that your client's claim is subject to the Employee Retirement Income Security Act of 1974 ("the Act"), he has the right to bring a civil action under section 502 (a) of the Act following an adverse benefit determination on review. Mr. Cross and his plan may have other voluntary alternative dispute resolution options, such as mediation. One way to find out what may be available is to contact your local U.S. Department of Labor Office and your State insurance regulatory agency.

Sincerely,
Regina Angiolillo,
Senior Benefit Analyst
Quality Review Unit